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Supreme Court, U.S.
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No.____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2001

Debra Bavouset, *Petitioner,*
v.
State of Maine, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of Maine
Sitting as the Law Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a police officer violate a drunk driving suspect's right to due process of law when, before the suspect refuses to take a blood-alcohol test, the officer advises her erroneously that the mandatory jail sentence upon her conviction and failure to submit to the test is forty-eight (48) as opposed to ninety-six (96) hours and the officer simultaneously denies her repeated requests to speak with counsel?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

Debra Bavouset, *Petitioner,*
v.
State of Maine, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Maine Sitting as the Law Court

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Debra Bavouset respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Maine sitting as the Law Court in this case.

OPINIONS BELOW

State of Maine v. Debra Bavouset, Maine Supreme Judicial Court Citation: 2001 Me. 141, 784 A. 2d 27 App. *infra,* 1a-4a.
Kennebec County Maine Superior Court Citation: Docket Nos. CR-98-270-271 (Kenn. Cnty. Me. Sup. Ct. Feb. 3, 2000) Order on Motion to Suppress and Dismiss App. *Infra*. 5a-11a.

JURISDICTION

The decision of the Maine Law Court sought to be reviewed was entered on October 17, 2001.
Defendant, Debra Bavouset, claims that her right to due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States has been violated by the State of Maine.
This Court has jurisdiction to review the foregoing decision pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment 14, Section 1

"...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT

A. The Stop and Interrogation

Officer Daniel Goss of the Waterville, Maine, police department arrested Debra Bavouset on April 10, 1998, on suspicion of driving under the influence of alcohol. He took her to the police booking room where she immediately and repeatedly asked to speak with counsel. Officer Goss advised her that she had no right to consult with counsel before deciding whether to submit to a blood-alcohol test.

Officer Goss turned on the intoxilizer machine, which has a timer, and advised Debra Bavouset that if she refused to take the test her refusal would be admissible against her in evidence, that her license could be suspended for up to six years, and that she would be subject to a mandatory license suspension and a mandatory jail term upon conviction. All of those statements were correct. After the officer gave her a "last chance" (App., *infra,* 8a) to submit to the test, she asked him to repeat the consequences of refusal. He repeated the same ones, and she again asked to speak with counsel. That request was denied. She then asked specifically about the mandatory minimum jail time. Officer Goss responded that it would be a "minimum period of time." App., *infra,* 8a. He then said, "I believe its forty-eight (48) hours." App., *infra,* 8a. That statement was incorrect. The mandatory minimum sentence is ninety-six (96) hours. App., *infra,* 12a. The officer then again asked her to take the test. She asked about possible automatic conviction. The officer told her it was not an automatic conviction but an automatic minimum jail term upon conviction. After that exchange, the intoxilizer timed out and the officer declared that she had effectively refused to take the test.

B. Proceedings Below

Debra Bavouset moved to dismiss so much of the charges as alleged failure to submit to a blood-alcohol test. She argued that the charges should be dismissed or the

refusal suppressed because Officer Goss had given her incorrect information about the mandatory minimum jail time while simultaneously denying her access to counsel to correct the incorrect information. The Superior Court denied the motion. A first jury, which had the refusal in evidence, deadlocked. The second jury, which also had the refusal in evidence, convicted and Debra Bavouset was sentenced to the ninety-six (96) hour mandatory minimum jail sentence required by Maine statute, 29-A M.R.S.A. §2411.5.A. (3)(b). App., *infra,* 12a. On appeal the Supreme Judicial Court of Maine sitting as the Law Court affirmed.

SPECIFICATION OF THE STAGE IN PROCEEDINGS WHEN THE FEDERAL QUESTION WAS RAISED

The federal question of which review is sought is whether the officer's simultaneous giving of incorrect advice as to the length of the mandatory minimum jail sentence and refusal to allow Bavouset to consult counsel upon repeated requests violated her rights to due process of law.

A. The Superior Court Order

Defendant first raised that federal question in the form of a Motion to Suppress and Dismiss, addressed to the Maine Superior Court, Motion denied, Docket Nos. 98-270-271 (Kenn. Cnty. Me. Sup. Ct., Feb. 3, 2000) App., *infra,* 5a-11a.

The order denying the Motion to Dismiss was issued by Justice Donald Marden and stated, in pertinent part: "Further, the court is satisfied that it is not a violation of due process when there is a failure to make a distinction between ninety-six (96) hours and forty-eight (48) hours upon refusal and conviction." Order of Justice Marden dated January 31, 2000, at page 6. (Hereinafter Marden @ 6) App., *infra,* 9a.

The Marden order refers to *Roberts v. State of Maine*, 48 F.3d 1287 (1st Cir. 1995), the case upon which defendant relied primarily, and continued: "Second, the

due process requirements are required by the fact of incarceration, not the period of jail time. 'The core liberty interest Roberts asserts in remaining free from incarceration is entitled to full procedural due process protection.' Cyr, concurring, Roberts at 1303. Third, the analysis in Roberts utilizes a theory of incarceration for refusal as a form of criminal punishment, for which it is clear the accused is entitled to notice. The notice of mandatory incarceration is sufficient; there is no indication the length of incarceration affects the due process requirement." Marden @ 7. App., *infra,* 9a.

Based upon Justice Marden's order, Debra Bavouset's refusal to take an intoxilizer test was presented to the jury and was used both as a basis for conviction and as a basis for imposing a mandatory minimum sentence of ninety-six (96) hours in jail.

B. The Law Court Decision

Upon appeal, the Supreme Judicial Court of Maine, sitting as the Law Court, affirmed on the grounds that the officer's misstatement did not violate Debra Bavouset's rights to due process. The Law Court concluded its five page opinion with the following two paragraphs:

"¶7 There exists no bright line past which an officer's misstatement must result in suppression of evidence of a refusal. Rather, when a defendant asserts that the circumstances surrounding a refusal to take a blood-alcohol test have violated her right to due process, we review the procedures used by the police to determine if the conduct 'offends the community's sense of justice, decency, and fair play.' Id. ¶ 11, 736 A.2d at 265 (quoting *Roberts*, 48 F.3d at 1291.) [Id. here refers to *State v. Cote* 1999 ME 123,736 A 2d. 262.]

"¶8 In this case, we conclude that Bavouset was sufficiently informed that significant negative consequences would result from her refusal and that the officer's misstatement does not offend the community's sense of justice, decency, or fair play. Neither Goss's uncertain misstatement, made after a significant period of

time during which Bavouset – having been correctly informed of the consequences of a refusal – failed to indicate whether she would take the test, nor his denial of Bavouset's request for counsel, acted to deprive Bavouset of fundamental fairness." State v. Bavouset 2001 ME 141, ¶¶ 7 and 8, 784 A.2d @ 30. App., *infra*, 3a-4a.

REASONS FOR GRANTING THE PETITION

Justice, decency and fair play prevent an officer of the law from misinforming a defendant affirmatively of the consequences of a decision she is required to make and simultaneously refusing her request to talk to a lawyer who would, at least presumably, give her accurate advice about the consequences of the required decision.

This Court has twice recently addressed the due process aspects of suspending the license of allegedly drunk drivers. See *Mackey v. Montrym* 443 U.S. 1 (1979) and *Illinois v. Batchelder* 463 U.S. 1112 (1983). Those cases do not deal with warnings to the driver. They are instructive, however, in their reliance on *Mathews v. Eldridge* 424 U.S. 319 (1976). Ultimately, the *Eldridge* test also applies in this case.

This Court last addressed the relationship between due process and warnings to drivers facing a choice as to whether to take a chemical test in *South Dakota v. Neville,* 459 U.S. 553 (1983). The failure to warn in *Neville* did not involve any affirmative misstatement by the police officer. Language in *Neville* suggests that such affirmative misstatements may well violate due process.

"...[W]e think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur." 459 U.S. @ 566.

"...[W]e hold that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial." 459 U.S. @566.

This case is the proper one to clarify the *Neville* rule as it applies to affirmative misstatements by police officers coupled with denial of access to counsel.

A. Justice Marden's Error

Justice Marden's decision on the Motion to Suppress or Dismiss, as set out in the appendix, recites the facts clearly and cogently. App., *infra,* 5a-11a. Justice Marden found a refusal had occurred when the intoxilizer timed out.

Justice Marden also commented on Officer Goss's misstatement of the law as follows: "Inasmuch as the officer had only mentioned a period of forty-eight (48) hours once up to that point [the timing out of the intoxilizer] and it was couched in the terms 'I believe,' it does not appear that the defendant was misled." Marden @ 5-6 App., *infra,* 9a. This should not be considered a finding that Debra Bavouset was not misled but rather a comment that the facts do not require a finding that she was misled. Whether she was misled remains a question. Even the possibility that she was or could have been misled requires a suppression of her refusal. A defendant who is affirmatively misinformed by an officer who has her in custody cannot be presumed to have had adequate information to make a properly informed decision, especially when she asked for and was denied the right to consult with counsel.

Justice Marden focused on the strict requirements of the *Roberts* decision. In *Roberts*, the defendant in similar circumstances was not informed that there was any mandatory jail sentence. Further, the officer told him that he had been informed of the consequences of a refusal. The *Roberts* court found this incorrect information, in the face of denial of defendant's request to speak with counsel, a violation of due process. Justice Marden said that the *Roberts* court was concerned about the fact of incarceration and not the length of incarceration. He therefore found that *Roberts* did not require suppression of Bavouset's refusal or dismissal of the charge that she refused to take the test.

Justice Marden referred to the proper test for due process violations as set out in *Mathews v. Eldridge* 424 U.S. 319 (1976). He implicitly applied the *Eldridge* test to

the Bavouset facts. He concluded that the *Eldridge* factors - private interest of the accused, risk of erroneous deprivation and the government's interest in its procedures - relate to the fact but not the length of incarceration. He offered no explanation as to why he so concluded and no supporting citation.

Debra Bavouset asks what interest the government has in retaining the right to misinform defendants which outweighs the defendant's right to know how long she may stay in jail as a result of a decision made after being misinformed by the police in the absence of counsel. Debra Bavouset asks what procedure is more likely to result in erroneous deprivation than sanctioned misinformation from an officer of the law.

B. The Law Court's Errors

The Maine Law Court took the analysis further than Justice Marden. It is significant that the Law Court, in its affirmance, did not cite or rely on Justice Marden's observation that it does not appear she was misled. The Law Court rather assumed she was misled. It stated: "He [Roberts] was therefore misled regarding the *fact* of incarceration rather than its *duration,* whereas Bavouset was incorrectly informed only in unsure language about the duration of incarceration after having been correctly informed many times of the consequence of a refusal." *Bavouset* 2001 ME 141, ¶5, 784 A.2d at 29. (Emphasis in original.) App., *infra,* 3a.

Neither Justice Marden nor the Law Court could mean that duration is never important. Had the difference been between forty-eight (48) hours and forty-eight (48) months, certainly the courts would have recognized a qualitative difference worthy of constitutional protection. Duration of deprivation was recognized as significant in *Mackey v. Montrym* 443. U.S. 1 (1979). The suggestion therefore that only the fact of incarceration and not its duration is protected by due process considerations is just wrong.

The difference at issue was forty-eight (48) hours. That is, Officer Goss told her she would be subject to a

forty-eight (48) hour minimum term rather than a ninety-six (96) hour minimum as the law required. In *Roberts* the total time of incarceration involved was forty-eight (48) hours. To a single mother of three children, as Bavouset was, an additional forty-eight (48) hours in jail certainly could have as much significance as the first forty-eight (48) hours had to *Roberts*. She was deprived of forty-eight (48) hours of liberty without proper warning. That is worthy of protection.

While finding, as did Justice Marden, that *Roberts* does not mandate suppression in this case, the Law Court focused less on the limited nature of the *Roberts* holding than on the broad test *Roberts* requires. As the Law Court found, *Roberts* requires an investigation of the community's sense of justice, decency and fair play. The Law Court found that the facts of the *Bavouset* case did not violate that standard.

Implicitly *Roberts* held otherwise. The facts of *Bavouset* are different from the facts of *Roberts*, but the liberty interest - forty-eight (48) hours – and the police misconduct – giving erroneous information while denying access to counsel – are precisely the same.

Had the Law Court reviewed the three part *Eldridge* test, it would have had to acknowledge:

1. Bavouset's interest in two days of freedom was high –as important as *Roberts's* interest in two days of freedom;

2. The risk of erroneous deprivation is very high when the state sanctions inaccurate police warnings while denying access to counsel;

3. Maine's interest in preserving the right to give inaccurate warnings is very small when compared with the simple remedy of requiring police to give accurate warnings.

C. The Law Court's Refusal to Follow Federal Precedent

After the First Circuit Court of Appeals instructed the District Court to issue the writ of habeas corpus in *Roberts* because the Maine Law Court's interpretation of the due process clause was too cribbed, the Law Court

continued to ignore federal due process precedent. In *Maine v. Hunnewell* 1998 ME 267, 721 A.2d 979, the Law Court held that a driver could be held responsible for having ignored a notice of license revocation from the Secretary of State, which the driver never in fact received. In *State v. Cote* 1999 ME 123, 736 A.2d 262, the Law Court held that a driver stopped for operating under the influence of alcohol could have his refusal to take a chemical test used against him even though he had not been warned of all the consequences of that refusal. The *Cote* ruling differed from the *Bavouset* ruling in that the former only involved failure to warn whereas *Bavouset* involves affirmative misinformation.

Magistrate Judge Beaulieu of the United States District Court recommended the granting of a writ of habeas corpus in *Hunnewell v. Kennebec County Sheriff* Docket 98-0251B (U.S. District Court D. Me. Oct. 1, 1999) Magistrate's Recommended Decision. (Not reported in F. Supp.2d) 2000 WL 863201 (In Westlaw, the Recommended Decision is erroneously dated as Mar. 3, 2000) App., *infra,* 13a-18a. In doing so, he found that the Law Court had ignored federal precedent in *Maine v. Hunnewell* and noted that the Law Court's ruling in *Cote* did not follow federal law.

"In addition, the Court disagrees with the statement in *Cote* that 'the failure to warn a defendant of every possible consequence of his decision does not rise to the level of a due process violation when the defendant is sufficiently warned that his refusal will have significant consequences.' Id. at 4. To the contrary, regardless of whether a defendant is warned of many negative consequences, if he or she is not warned of the deprivation of a protected liberty or property interest, in the absence of an emergency situation excusing the failure to warn, due process has been denied. *Bell v. Burson*, 402 U.S. 535, 542 (1971)." *Hunnewell v. Kennebec County Sheriff, supra., N2.* @3. App., *infra,* 17a.

The United States District Court found Magistrate Judge Beaulieu's footnote 2, quoted above, to be irrelevant and did not adopt it, but the Court did not find the

Magistrate's observations to be wrong. App., *infra,* 19a-23a.

Indeed, the Court granted the petition for writ of habeas corpus because it found that in *Maine v. Hunnewell* the Law Court had failed to accord the defendant due process under the *Eldridge* test. *Hunnewell v. Kennebec County Sheriff,* Docket 98-0251B (U.S. District Court D. Me. Feb. 2, 2000), Order Modifying the Recommended Decision of the Magistrate Judge, (Not reported in F. Supp. 2d) App., *infra,* 19a-23a.

The Federal judiciary has had to correct the Maine Law Court's misapplication of the *Mathews v. Eldridge* test in both *Roberts* and *Hunnewell.* The *Cote* case would apparently have been corrected as well had it been challenged directly if Magistrate Judge Beaulieu's irrelevant comments have any meaning.

Bavouset is thus the fourth recent case, after *Roberts, Hunnewell* and *Cote* in which the Maine Law Court has refused to follow federal precedent when interpreting the due process clause.

D. The Maine Law Court's Difference with other State Courts

Nine American states have specifically determined that an arresting officer must give accurate information according to their implied consent statutes if the driver's decision to refuse the test or take it is to be used against her.

The Hawaii Supreme Court put it this way: "Other jurisdictions faced with this issue have established, in varying forms, the basic principle that, where a change in the wording of the implied consent warnings operates to convey a different meaning than that specified in the statute, the driver cannot be held to have made a knowing and intelligent decision whether to submit to an evidentiary alcohol test." *State v. Wilson* 987 P.2d 268, 273 (Haw. 1999). The other similar jurisdictions are

Georgia, Idaho, Missouri, Nebraska, Ohio, Pennsylvania, Texas, and Washington. [1]

Significantly, the misinformation in *Wilson* was as to the length of a penalty rather than to its existence.

In *Wilson* the arresting officer misinformed defendant of the length of his potential loss of his license. The statute provided that defendant could lose his license for three months to a year. Defendant was told he could lose his license for three months. This error in length of a penalty much less severe than incarceration violated Hawaii's informed consent process. The dissent argued unsuccessfully that the difference between a three-month and a one-year suspension was immaterial. The majority said, "To the contrary, the difference between revocation for three months and one mandatory year is a substantive one." *Wilson* 987 P. 2d @ 276. As the *Wilson* court said, "Hawaii's implied consent scheme *mandates* accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test." *Wilson* 987 P.2d @ 272. (Emphasis in original.)

In *Beem v. State* 119 Idaho 289, 805 P.2d 495 (App. 1991), the difference between a one hundred twenty (120) day license suspension and a one hundred eighty (180) day license suspension was deemed sufficiently misleading to deprive the defendant of the ability to make an informed decision.

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[1] State v. Terry, 236 Ga. App. 248, 511 S.E.2d 608 (1999)
Beem v. State, 119 Idaho 289, 805 P.2d 495 (App. 1991)
Bennett v. Director of Revenue, 889 S.W.2d 166 (Mo. App. 1994)
Perrine v. State of Nebraska, Department of Motor Vehicles, 249 Neb. 518, 544 N.W. 2d 364 (1996)
Buchanan v. Registrar, Ohio Bureau of Motor Vehicles. 85 Ohio App. 3d. 263, 619 N.E. 2d 523 (1993)
Graves v. Commonwealth, 112 Pa. Cmmw. 390, 535 A.2d 707 (1988)
State v. Sells, 798 S.W. 2d 865 (Tex. App. 1990)
Mairs v. Department of Licensing, 70 Wash. App. 541, 854 P.2d 495 (1991)

Thus, the length of a penalty as opposed to the fact of a penalty is material. When the penalty is incarceration, the difference rises to constitutional proportions, especially when the defendant sought the advice of counsel, which was refused.

SUMMARY

Roberts and *Wilson* and the cases reviewed in each support a simple duty for the state – get its advice right or let the defendant have access to counsel who can. Otherwise, do not use the defendant's ill informed decision, whether to take or to refuse a test, against the defendant.

Maine has departed from federal precedent and nine other states in determining what the community considers fair and decent. While the other states rely on their own statutes, they establish a standard of fair play which should be considered the national community's standard. Only the Supreme Court of the United States can determine that the national community considers accurate police warnings to be a fundamental requirement of fair play when the defendant has been refused counsel and must make a decision that could lead to mandatory incarceration of unexpected length.

Although denying that it has done so, the Maine Law Court has departed from the law necessarily created by the holding in *Roberts*. This conflict between the First Circuit Court of Appeals and the Maine Law Court is worthy of correction by the Supreme Court.

Roberts has also been found "unpersuasive" by the Supreme Court of West Virginia. See *State ex rel. Sims v. Perry* 515 S.E.2d 582 (W.Va. 1999).

The holding in *Roberts* reflects an important concept in American constitutional jurisprudence, which clarifies *Neville* and should be affirmed by the Supreme Court.

For the reasons set forth, Debra Bavouset respectfully prays that this Court will grant a writ of certiorari and hear her case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2002

APPENDIX A

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision: 2001 ME 141
Docket: Ken-00-465
Argued: September 11, 2001
Decided October 17, 2001
Panel: WATHEN, C.J.,* and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.
STATE OF MAINE v. DEBRA BAVOUSET
Saufley, J.

[¶1] Debra Bavouset appeals from the judgment of conviction entered in the Superior Court (Kennebec County, *Gorman, J.*) upon a jury verdict finding her guilty of operating under the influence of alcohol and finding that she refused to submit to a blood-alcohol test. Bavouset challenges the conviction on multiple grounds. The only ground worthy of discussion, however, is the argument that the court erred when it denied Bavouset's motion to suppress all evidence of her refusal to take a breath test because she was given inaccurate information regarding the consequences of a refusal by the arresting officer. We affirm the judgment.

I. BACKGROUND

[¶2] Bavouset was arrested by Officer Daniel Goss of the Waterville Police Department for operating under the influence of alcohol. At the Waterville police station, Goss asked Bavouset numerous times to submit to a blood-alcohol test by means of an intoxilizer machine. Bavouset responded to each request with her own request to have an attorney present. Goss declined her request for counsel and repeatedly warned her of the consequences of refusing the test, including mandatory minimum jail sentence, in accordance with 29-A M.R.S.A. § 2411(5)(A)(3)(b) (Supp. 2000). Although Goss correctly informed Bavouset of the consequences of a refusal, Bavouset continued to respond in a manner that avoided making a decision. After some time, in addition to reminding Bavouset that her behavior would be considered a refusal and would carry significant consequences, Goss

incorrectly informed Bavouset that he "believe[d]" the mandatory period of incarceration for refusing was forty-eight hours, when in fact it is ninety-six hours.[1] *See* 29-A M.R.S.A. § 2411(5)(A)(3)(b) (Supp. 2000). Goss eventually determined that Bavouset refused the test. All of these events were recorded on videotape.

[¶3] Bavouset pleaded not guilty to the charge of operating under the influence, Class D, *see* 29-A M.R.S.A. § 2411(1) (1996), and moved to suppress evidence of her refusal. After reviewing the videotape, the court (*Marden, J.*) denied the motion. Bavouset was later convicted upon a jury verdict finding her guilty of operating under the influence and finding that she refused to submit to the blood-alcohol test. Her sentence included the mandatory ninety-six hour incarceration for refusing to submit to the blood-alcohol test. This appeal followed.

II. DISCUSSION

[¶4] The sixth Amendment right to counsel does not attach until the defendant has reached a "critical stage" in the proceedings. *United States v. Wade*, 388 U.S. 218, 227-28 (1967). The administration of a blood-alcohol test is not a critical stage. *State v. Allen*, 485 A.2d 953, 956 (Me. 1984). Accordingly, Bavouset does not argue that she was entitled to counsel simply because she had been arrested and asked to take the test. Rather, she argues that the officer's error in estimating the length of incarceration, combined with his refusal to allow her to speak with counsel before deciding whether to take the test, resulted in a fundamentally unfair process. Bavouset therefore contends that the court erred in denying her motion to suppress the evidence that she refused to take the test. Citing *Roberts v. Maine*, 48 F.3d 1287 (1st Cir. 1995), she urges us to conclude that Goss's erroneous information regarding the period of mandatory incarceration misled her at a time when she had to make the crucial decision of whether to submit to the test, and that Goss's denial of her request for counsel under these circumstances therefore violated her due process rights.

[¶5] The facts of *Roberts*, however, are distinguishable from those presented here. Roberts was led to believe that no mandatory incarceration would result

from refusing the test when in fact a forty-eight hour mandatory period was required at the time. *Roberts*, 48 F.3d at 1289. He was therefore misled regarding the *fact* of incarceration rather than its *duration*, whereas Bavouset was incorrectly informed only in unsure language about the duration of incarceration after having been correctly informed many times of the consequences of a refusal.

[¶6] This case is also distinguishable from *State v. Stade*, 683 A.2d 164 (Me. 1996), in which a police officer failed to warn an OUI arrestee of the consequences of refusing the test, and then erroneously assured the arrestee that he could obtain a work permit after losing his driver's license upon conviction. *Stade*, 683 A.2d at 165. In contrast, Bavouset was correctly informed about the consequences of refusing the test and was not assured of anything given that Goss gave the incorrect information only after some time and with uncertain language. Moreover, in *State v. Cote*, 1999 ME 123, 736 A.2d 262, we held that an OUI arrestee has no constitutional right to be informed of every possible consequence of refusing to submit to a blood-alcohol test as long as he or she is warned that significant negative consequences will result. *Cote*, 1999 ME 123, ¶¶ 10, 17, 736 A.2d at 265-66.

[¶7] There exists no bright line past, which an officer's misstatement must result in the suppression of evidence of a refusal. Rather, when a defendant asserts that the circumstances surrounding a refusal to take a blood-alcohol test have violated her right to due process, we review the procedures used by the police to determine if the conduct "offends the community's sense of justice, decency, and fair play." *Id.* ¶ 11, 736 A.2d at 265 (quoting *Roberts*, 48 F.3d at 1291).

[¶8] In this case, we conclude that Bavouset was sufficiently informed that significant negative consequences would result from her refusal and that the officer's misstatement does not offend the community's sense of justice, decency, or fair play. Neither Goss's uncertain misstatement, made after a significant period of time during which Bavouset—having been correctly informed of the consequences of a refusal—failed to indicate whether she would take the test, nor his denial of

Bavouset's request for counsel, acted to deprive Bavouset of fundamental fairness.
The entry is: Judgment affirmed.

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APPENDIX B

STATE OF MAINE
KENNEBEC, ss.
SUPERIOR COURT
CRIMINAL ACTION
DOCKET NOS CR-98-270- & 271
STATE OF MAINE v. DEBRA BAVOUSET,
Defendant

ORDER

This matter is before the court on defendant's motion to suppress. In her motion, the defendant denies the conclusion by the State that she refused to take an intoxilyzer test and further alleges that she was subject to extensive questioning without the presence of counsel despite repeated requests. She asks the court to determine that she should not be charged with a refusal and to suppress all statements made by her while in custody after denial of her request for counsel. As a consequence of the court's decision upon her motion, she asks it to dismiss the charges relating to possession of a scheduled drug as alleged in the complaint in CR-98-271.

A hearing was held on this motion at which time the arresting officer testified that after stopping the defendant's vehicle for speeding in the city of Waterville, the officer made certain observations and concluded there was reason to believe that the defendant was under the influence of intoxicants. The officer conducted field sobriety tests, arrested the defendant, and brought her to the booking room of the Waterville Police Department. A videotape of the entire booking proceeding was admitted to evidence. The officer testified that he completed the implied consent form, and that the defendant appeared to understand it and signed the form. The defendant insisted throughout the implied consent proceeding that she wanted to have a lawyer or to see a lawyer prior to making any decision. During the course of the arrest, the defendant's vehicle and person were inventory-searched. A package of pills were found in a container marked "sample." As a

result of finding the package of pills, certain questions were asked of the defendant.

Defendant's primary concern is that she was misled by the police officer who provided her incorrect information as to the consequences of her refusal to take the intoxilyzer test. She insists that she was told a number of times that refusal to take the test would result in a 48-hour mandatory jail time upon her conviction rather than the 96 hours mandated by statute when the person fails to submit to tests at the request of the law enforcement officer. The State disagrees, arguing that she had already refused the test by the time the 48 hours was mentioned by the officer and, further, the officer's error in advising her of the 48-hour jail time rather than the 96 hours of jail time upon conviction was not misleading, was not a violation of her rights of due process, and should not be the basis for a finding of an unlawful refusal.

Defendant relies on *Roberts v. State of Maine*, 48 F.3d 1287. That First Circuit case establishes that Maine's implied consent procedure, as used at that time, implicated important liberty interests, which deserved substantial due process protection. It further held that a:

> "Suspected drunk driver does not have a due process right to contact an attorney whenever the state imposes mandatory sentencing consequences on refusal to take a blood/alcohol test but, rather, reasonable request to contact counsel must be honored if counsel could correct misleading information provided by state at point when suspect must make decision that is crucial for later sentencing."

Further, "due process required that suspect who is requested to take a blood/alcohol test and who is provided with incorrect statement of consequences, so that suspect is unaware that failure to take test will result in mandatory 48-hour sentence if convicted of drunk driving, be given reasonable opportunity to call counsel before deciding whether to be tested."

Roberts involved a situation where a police officer took the defendant into custody and while he was handcuffed at the police station,

> Presented him with a choice that had irrevocable sentencing consequences involving a mandatory period of incarceration. *Roberts* was asked to take a blood/alcohol test and told that if he refused to submit to the test, his driver's license would be suspended and the fact of his refusal could be used against him at trial. *Roberts* was then informed that he had been 'advised of the consequences of failure to comply.' This statement was misleading because there is at least one additional consequences for failing to consent to a test: a 48-hour term of incarceration. *Roberts* was never told that his refusal to take the test could also result in a mandatory two-day jail sentence if he were to be convicted of driving under he influence of alcohol. Thus, *Roberts* was not informed of 'the consequences' of failing to comply with the 'implied consent' procedure.

Roberts therefore raises the question as to whether the officer's statement of belief as to the minimum period of incarceration, in error as to length, constitutes the level of violation of rights of due process as described in *Roberts*, therefore requiring the officer to allow the defendant to have the advice of counsel before exercising her rights under the implied consent law.

The court has reviewed the videotape on multiple occasions for purposes of determining the exact words stated and the sequence of events. At approximately five minutes into the proceedings, the defendant was seated at the end of a table at which the officer was seated making reference to a form. He advised her that she had a duty to submit to an alcohol test and asked her if she understood. After repeated attempts to fail to respond to the question, relying instead upon her desires to have an attorney

present, she finally gave indications of understanding the duty. Then, the officer advised her that he was giving her a breath test, that this was his option, and that she had a right to her own test through her own resources. At this point, the issue was raised regarding refusal by inquiry from the defendant and the officer then advised her that if she refused to take the test, her license could be suspended for up to six years. The officer then advised the defendant that her failure to submit to the test was admissible against her in a trial on the matter and that it could be considered an aggravating factor. In that regard, the officer then advised her that if she was convicted after a refusal to take the test, there was a mandatory suspension and jail term. Having been advised of her options, she was then asked whether she wished to take the test. Her response was to discuss the matter with her attorney. The officer advised her she had no right to an attorney in making this decision, it was her personal decision. He asked for a direct answer, "Yes or no?" The defendant continued to refuse to respond simply indicating her desire to talk to a lawyer. At this point, the officer advised her that it was her last chance and that her failure to respond would be considered a refusal if she did not respond to his questions. She then asked for the consequences again of refusing to take the test. She was advised that there was a mandatory minimum penalty, that it could result in suspension up to six years, and that she would be subject to a "minimum mandatory period " of jail time.

The officer again asked her, "Will you take the test or not?" The defendant again responded with references to an attorney. Further discussion took place with regard to her refusal and its consequences. At this point, she made further inquiry of the jail time and the officer responded that it would be a "minimum period of time." He followed his remark with the following language, "I believe its 48 hours." The officer made further inquiry reminding the defendant that if she did not take the test, she was subject to mandatory penalties. At this point, the defendant asked if she would be automatically convicted and was corrected by the officer. He made further explanation that if she was convicted, she could go to jail automatically for a

minimum period. The time then expired on the intoxilyzer machine, which had been programmed to administer the test. The officer then declared the option at an end and considered it a refusal.

While there was further discussion with regard to the minimum period of time in jail upon a conviction of operation under the influence, and the defendant had not yet signed the consent form, the court is satisfied that the refusal had taken place when the intoxilyzer terminated the session. Inasmuch as the officer had only mentioned a period of 48 hours once up to that point and it was couched in the terms "I believe," it does not appear that the defendant was misled. Further, the court is satisfied that it is not a violation of due process when there is a failure to make a distinction between 96 hours and 48 hours upon refusal and conviction. The fundamental issue was a minimum mandatory period of incarceration upon conviction and the defendant was clearly advised of that consequence upon her refusal.

This court distinguishes Roberts for a number of reasons. First, the majority opinion makes it clear that it was addressing the particular facts of that case. "We find that under the particular circumstances of this case,... "*Roberts* at 1288. "Furthermore, we do not find, in this case at least, that a suspected drunk driver has a due process right to contact an attorney whenever the state imposes mandatory sentencing consequences upon the refusal of the suspect to take a blood/alcohol test." *Roberts* at 1294. Second, the due process requirements are required by the fact of incarceration, not the period of jail time. "The core liberty interest Roberts asserts in remaining free from incarceration is entitled to full procedural due process protection." Cyr, concurring, Roberts at 1303. Third, the analysis in Roberts utilizes a theory of incarceration for refusal as a form of criminal punishment, for which it is clear the accused is entitled to notice. The notice of mandatory incarceration is sufficient; there is no indication the length of incarceration affects the due process requirement. Finally, Judge Cyr articulates the mandate, "The legitimate interests of the state, as well as the accused, would be significantly

advanced by the simple inclusion of a straightforward warning that a first-time refusal to submit to chemical testing must be followed by a minimum term of confinement for operating a motor vehicle while under the influence of alcohol or drugs." *Roberts* at 1304. As the decision concludes, applications of the standards of Mathews (*Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)), finds the private interest, the risk of erroneous deprivation and the government's interest in its procedure, all relating to the criminal penalty of jail time, rather than its length.

The issue of the scheduled drug presents a different question. When the officer found the pills, he made an inquiry of the defendant, "What are these?" Upon receiving a response to that question, he then asked the defendant, "Do you have a prescription?" The court is satisfied that the inquiries by the officer of the defendant while in custody was proper inquiry with respect to an individual in custody under conditions of probable cause as being impaired by alcohol. The presence of pills would provide further information to the officer in explanation of the impairment of her mental and physical faculties and could even be relevant to her well being from a medical point of view. On the other hand, the question with regard to the prescription so closely relates to an investigation of an unlawful possession of drugs that it was such that should have been preceded by the *Miranda* warning. Consequently, the court believes that the question of the defendant as to her rights to the pills by proper prescription was a violation of her rights under the *Miranda* doctrine and that question, its response, and all matters thereafter relating to the scheduled drug should be suppressed.

The entry will be:

> For reasons herein stated, the court finds that the defendant has refused to take a blood alcohol test; all questions asked of the defendant and her responses following the officer's inquiry as to what the pills were for and her response, are SUPPRESSED and shall not be

admissible in any criminal proceedings; defendant's motion to dismiss is DENIED.

Dated: January 31, 2000

Donald H. Marden

Justice, Superior Court

APPENDIX C

Statute 29-A M.R.S.A. §2441.5.A (3)(b)

§2441. Criminal OUI

5. Penalties. The following minimum penalties apply and may not be suspended:

A. For a person having no previous OUI offenses within a 10-year period:

(3) A period of incarceration as follows:

(b) Not less than 96 hours when the person failed to submit to a test at the request of a law enforcement officer;

APPENDIX D

Hunnewell v. Kennebec County Sheriff D. Me. 2000, Mar. 3, 2000 (Note- this Westlaw date is in error. The Amended Recommended Decision was docketed October 1, 1999 in Docket 98-0251B)
2000 WL 863201
Only the Westlaw citation is currently available.

AMENDED RECOMMENDED DECISION

Beaulieu, Magistrate J.
*1 Petitioner seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254 following his conviction in Kennebec County Superior Court for operating a motor vehicle after his license had been suspended in violation of 29 M.R.S.A. section 2412-A. The Petition raises due process questions relative to the manner in which his license was suspended. Petitioner raised these issues before the Maine Supreme Judicial Court ["LAW COURT"], and his appeal was denied on December 14, 1998. Maine v. Hunnewell, 721 A.2d 979 (Me. 1998)
Our authority in evaluating a Petition for Writ of Habeas Corpus when the state court has addressed the issues is limited. The statute provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). There is no material dispute in this case regarding the facts as stated in the Law Court decision, which are presumed by this Court to be correct. 28 U.S.C. § 2254 (e). The factual statement reads in its

entirety:

Hunnewell was charged with operating an unregistered vehicle in the fall of 1996 and given a Uniform Summons and Complaint to appear at the District Court (Springvale) on January 6, 1997. Having inadvertently failed to appear in court on that date, in February he wrote to the clerk's office asking how to rectify the situation. The clerk informed Hunnewell in writing that his license was under suspension until he either pled not guilty or pled guilty and paid the $122 fine. Hunnewell mailed the $122 fine to the court. The clerk then notified the Secretary of State that Hunnewell was eligible to have his license reinstated.

Hunnewell was stopped by a police officer in Sidney on the evening of February 22, 1997 due to a problem with the lights on his vehicle. Because Hunnewell had not paid the reinstatement fee, his license remained under suspension. The officer informed Hunnewell that his license was under suspension and issued him a Uniform Summons and Complaint for operating a motor vehicle after his license had been suspended. When Hunnewell returned home that evening, he discovered a notice from the Secretary of State in his mailbox informing him that his license had been suspended and would remain suspended until he paid the reinstatement fee. *Hunnewell,* 721 A.2d at 979-80.

Hunnewell argued before the Law Court, as he does here, that the notice to him of his license suspension was constitutionally defective in that it deprived him of due process. The Law Court concluded, without citation to authority in support of its position, that Petitioner's due process rights were not violated because it was his own conduct that resulted in the license suspension (the failure to appear) and further, that he received adequate notice by virtue of the statute making driving after such a suspension a Class E criminal offense. *Hunnewell,* 721 A.2d at 980.

*2 This Court evaluates that conclusion in a two-step analysis:

First, the habeas court asks whether the Supreme Court

has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is 'contrary to' the governing rule. In the absence of a governing rule, the 'contrary to' clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding the petitioner's claim involved an unreasonable application' of Supreme Court precedent. *O'Brien v. Dubois,* 145 F.3d 16,25 (1st Cir. 1998).

In this case, there is a clearly defined rule that governs Petitioner's claim. Specifically, "it is fundamental that except in emergency situations (and [obtaining security from an uninsured motorist following an accident] is not one), due process requires that when a State seeks to terminate an interest such as that here involved [license suspension], it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971) (quoting *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306,313 (1950) (other citations omitted).

Petitioner's argument in this case does not implicate the State's failure to provide a hearing. Rather, he argues that proper notice of the license suspension would have prevented his having to resort to an imperfect means of investigating the steps necessary to have his license reinstated.

It is clear that the statute itself does not constitute prior notice. The Court could not conclude as a matter of law that statutory notice is constitutionally sufficient. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the [person] might reasonably adopt to accomplish it." *Mullen v. Central Hanover Bank & Trust,* 339 U.S. 306,315 (1950) The statute in this case does not provide for pretermination notice and opportunity to be heard, and it is the lack of pretermination notice that Petitioner challenges.

The Court also concludes that the Uniform Summons and

Complaint under which Petitioner was to appear on January 6, 1999 did not provide adequate notice under the due process clause. [1] The back of the Summons contains a check-box-style list of all the possible outcomes of the charge indicated on the other side. The first section involves the defendant's failure to appear to answer the charge, and provides that one outcome might be that his license or right to apply for a license could be suspended.
The first reason the Court cannot call the check box "notice" as a matter of law is that it does not clearly indicate that the license *will be* suspended, as the statute provides, but only that it *might be* suspended. Second, the pertinent information within the check box is severely abbreviated as: "Lic.I Rt. to OprIRt. to Obt. or App. for Lic. Susp'd."
*3 There is no authority for the proposition that notice in this form survives a due process challenge. Those cases suggesting these types of notices might suffice as "notice" for purposes of due process (none have so held), were dealing with actual *warnings*, rather than check boxes for recording future court action. *Rhode Island v. Szarek*, 433 A.2d 193, 193,198 &n.7 (R.I. 1981) ("warning that failure to pay for ticket or a summons will result in a suspension of the violators driving privileges is printed on the back of each summons issued in the state"); *Oregon v. Stoup*, 620 P.2d 1359,1367 (Ore. 1980) (statutory scheme provided for notice and hearing, in addition to statutory requirement that all summonses contain language that a failure to appear may result in suspension); *New York v. Hyman*, 366

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[1] On this issue, the Court hereby GRANTS Respondent's Motion to:
Enlarge the Record by the inclusion of a copy of the form Uniform Summons and Complaint presently in use throughout the State of Maine. As Respondent notes, the form contains a warning at the bottom in capital letters explaining the possibility of suspension without further notice and the need to pay a reinstatement fee in the event of such suspension. Petitioner's actual Uniform Summons and Complaint, included within the State court record transmitted by Respondent together with its initial response to the Petition, contains no such warning.

N.Y.S. 2d 989,993 (N.Y. Crim. Ct. 1975) (defendant had notice of the consequences of a guilty plea by virtue of a warning printed on the back of the summons in red type in a size equal to at least 12 Pt. type). All of these cases were resolved in state courts, and none of them cite Federal law in support of their holdings.

The Maine Law Court recently concluded that there was no due process violation when the state's "implied consent" form failed to contain a warning that two prior blood-alcohol test refusals could enhance a subsequent operating under the influence charge. *Maine v. Cote,* 1999 WL 553716 (Me. July 30,1999.)The Law Court noted that the nature of the private interest at stake was "tenuous" in light of the fact that there would only be unwarned consequences in the event of future criminal conduct. As the court stated: "failing to warn Cote of the potential consequences of refusing to submit to a chemical test will certainly not increase the risk that he will be convicted of OUI in the future." *Id.* at *3. That case adds nothing to our analysis, however, because the loss of license here is automatic upon the failure to appear.[2] This Court is satisfied that the Law Court's ruling that Petitioner received adequate notice in this case is contrary to clearly established Federal law.

To the extent Petitioner is also asserting that he was denied due process because he received incorrect information

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[2] This Law Court case is not particularly relevant to our analysis. The Law Court used the due process analysis set forth in *Matthews v. Eldridge,* 424 U.S. 319 (1976), which generally requires a balancing between the liberty interest at stake and the state's interest in its current procedure. *Maine v. Cote,* 1999 WL 553716 at *3 (Me. July30, 1999). In this case, the Court concludes there was no notice at all, and therefore no procedure to review. In addition, the Court disagrees with the statement in *Cote* that "the failure to warn a defendant of every possible consequence of his decision does not rise to the level of a due process violation when the defendant is sufficiently warned that his refusal will have significant consequences." *Id* at *4. To the contrary, regardless of whether a defendant is warned of many negative consequences, if he or she is not warned of the deprivation of a protected liberty or property interest, in the absence of an emergency situation excusing the failure to warn, due process has been denied. *Bell v. Burson,* 402 U.S. 535, 542 (1971)

from the clerk of court regarding the method for reinstating his license, however, the Court does not agree. The First Circuit Court of Appeals has been presented with another case involving incorrect information given by a state actor, and found that it did amount to a deprivation of due process. *Roberts v. Maine,* 48 F. 3d 1287 (1 st Cir.1995). In *Roberts,* however, petitioner was denied the opportunity to telephone his attorney, who, the court noted, could have corrected the misleading information provided by the police officer. *Id.* at 1293. Obviously, it is also possible that the attorney could have given equally misleading information, but the due process clause would still have been satisfied. In this Court's view, the crucial factor in *Roberts* was not the fact that petitioner received incorrect information, but that he was required to rely solely upon the information provided by the state actor. In this case, Petitioner could have chosen any number of methods by which to research his obligations following the license suspension. That he happened to ask a state actor does not mean the state has thereby deprived him of his due process rights.

Conclusion

*4 Because Petitioner was provided with no pretermination notice that his license would be [sic] for his failure to appear on the charge of operating an unregistered motor vehicle, I hereby recommend the Petition for Writ of Habeas Corpus be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28U.S.C. § 636 (b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order. D.Me. 2000. Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
GUY B. HUNNEWELL JR., Civil 98-0251-B
Petitioner
v.
KENNEBEC COUNTY SHERIFF
Respondent
ORDER MODIFYING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE
Brody, District Judge

On October 1, 1999, the United States Magistrate Judge filed his Recommended Decision with the Court. Petitioner Hunnewell and Respondent, the State of Maine, both filed Objections to the Recommended Decision. Having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record, the Court has made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision. In accordance with this de novo review, the Court modifies the Magistrate Judge's decision as follows:

1. The Court modifies the factual record, as-laid out by the Law Court and adopted, in its entirety, in the Recommended Decision at page 2, to delete the word "fine" from the description of the $122. This modification is in accordance with the clear and convincing evidence that the clerk did not refer to the $122 as a "fine" and Petitioner Hunnewell did not think that the $122 represented a simple "fine" for his initial offense of driving an unregistered motor vehicle. See 28 U.S.C.§ 2254(e) (explaining that petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence").

2. On page 4, the Court modifies that the final full sentence to read: "The Court also concludes the Uniform Summons and Complaint under which Petitioner was to appear on January 6, 1997, did not provide adequate notice under the due process clause."

3. To the extent the State objects to the Recommended Decision because the Uniform Summons and Complaint

received by the Petitioner actually included a warning that as a result of failure to appear, one's license "may be suspended without further notice and a reinstatement fee may have to be paid," the Court finds that such a conditional warning does not change the result. Under either the Summons included in the original record from state Court or the blank Summons offered by the State, the petitioner did not receive adequate notice that his license would be automatically suspended as a result of his failure to appear and that, once suspended, the license could not be reinstated without payment of both a fine to the court and a separate reinstatement fee to the Secretary of State.

4. The Court deletes the portion of the opinion contained in footnote 2 because it concurs with the Magistrate Judge that the Law Court's analysis in *Maine v. Cote* 736 A.2d 262 (Me. 1999), is not relevant to the due process question raised in this habeas petition and thus finds that further discussion of the Law Court's analysis in *Cote* is unwarranted.

5. Finally, the Court declines to adopt the Recommended Decision's analysis and application of *Roberts v. Maine*, 48 F.3d 1287 (lst Cir. 1995)) beginning on page 7. Thus, the Court modifies that portion of the Recommended Decision to read as follows:

While the facts presented by this habeas petition and the case of *Roberts v. Maine* 48 F.3d 1287 (1st Cir. 1995), are undeniably different, the Court believes that, like Roberts, the circumstances surrounding Petitioner Hunnewell's conviction for driving with a suspended license "present a unique situation in which the State of Maine failed to meet the requirements of fundamental fairness." *Roberts*. 48 F.3d at 1291. Specifically, the letter from the court clerk, dated February 13, 1997, gave Hunnewell misleading information by suggesting that Hunnewell's license would be suspended until he pleaded guilty and paid $122. This misleading information, relied on by Hunnewell, combined with two other factors to create a situation in which Hunnewell did not receive the notice necessary to constitute due process. First, there was an insufficient warning on the face of the summons. Second, there was an undue delay by the State both in

processing the suspension and notifying Petitioner Hunnewell of his license suspension for failure to appear.

The State's delay is documented in the record. On January 6, 1997, the suspension of Hunnewell's license was ordered by the Judge of the Springfield District Court. This order was not processed by the Court clerk until February 14, 1997, and then not processed by the Maine's Motor Vehicle Division until February 19, 1997. Because the notification of license suspension is not triggered until this dual processing is complete, notification of the suspension was not sent until sometime after February 19, 1997, and delivered by mail to the Petitioner's address on February 22, 1997. This represents a delay of over 44 days.[1]

Applying the test for Due Process violations laid out in *Mathews v. Eldridge* 242 U.S. 319(1976), to these facts, the Court must weigh:

> (1) Hunnewell's interest in freedom from five days of incarceration, the sentence imposed for his conviction of driving with a suspended license on February 22, 1997,
>
> (2) The risk of erroneous deprivation due to Maine's existing procedure for notification of suspension and the probable utility of additional or substitute safeguards, and
>
> (3) Maine's interest in adhering to the current notification procedure, including the fiscal and administrative burdens that additional procedures might entail.

See *Roberts* 48 F.3d at 1292-94 (quoting *Mathews v. Eldridge* 424 U.S. 319,335 (1976), and applying the factors).

Weighing all of these *Mathews* factors, the Court

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[1] During this delay, Petitioner Hunnewell paid $122 on February 19, 1997. With this payment to the Springfield District Court, Hunnewell believed he had resolved both his ticket for driving an unregistered vehicle and his failure to appear in court to answer the Summons, which triggered the license suspension.

concludes that Hunnewell's substantial interest in avoiding incarceration outweighs Maine's interest in adhering to its current system of notification. Additionally, the burden imposed on the State by requiring additional safeguards could be satisfied in a number of ways. First, the State could include a clear warning on the face of the summons that suspension for failure to appear is automatic and continues until a separate reinstatement fee is paid to the Secretary of State. Second, the notification could be mailed to the suspended license holder earlier by either speeding up or changing the current process of suspending licenses. Third, the State might change the reinstatement process so that the reinstatement fee and court-imposed fine are paid simultaneously, thereby foregoing the need for notification of a separate reinstatement fee.

Implementation of any of these alternatives would decrease the risk of erroneous deprivation with little additional burden on the State. Additionally, none of these procedural safeguards impede Maine's interest in immediately suspending the license of a driver who fails to appear in court to answer a summons or in penalizing people who drive with suspended licenses. These procedures simply make it more likely that a licensed driver is notified of a suspension and of the steps the driver must take to end the suspension and legally drive again.

Regardless of what notification procedures Maine chooses to implement in the future, it is clear that the notification provided to Petitioner Hunnewell was insufficient and untimely. When combined with the misleading information provided by the court clerk, the facts surrounding the Petitioner's conviction for driving with a suspended license demonstrate state action, which deprive Petitioner of his liberty without due process. To the extent the Law Court ruled that under these circumstances Hunnewell's due process rights were not violated, the Court finds that Federal law as interpreted by the Supreme Court in *Bell v. Burson*, 402 U.S. 535 (1971) and *Mathews v. Eldridge*. 424 U.S. 319(1976), requires a different result. See 28 U.S.C. § 2254(d)(1); *O'Brien v. Dubois*. 145 F.3d 16,24(1st Cir. 1998).

Other than the above modifications, the Court

finds that the objections of both parties are without merit and are adequately addressed in the Recommended Decision. Therefore, the Court concurs with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision and determines that no further proceeding is necessary.

A. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge is AFFIRMED.

B. It is further ORDERED that Petitioner's Petition for Writ of Habeas Corpus is GRANTED.

MORTON A. BRODY
United States District Judge
Dated this 2nd day of February, 2000.